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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 330

JOHN P. HOOKER,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT, NEW YORK LIFE INSURANCE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

This is an action by the beneficiary of a life insurance policy to recover the sum of $10,000.00 allegedly due under the "Double Indemnity" provision thereof.

A. The Policy.

The policy in controversy, effective June 3, 1938, was issued on the life of George K. Hooker in the sum of $10,000.00, his father, John P. Hooker, being the beneficiary. Under the terms of the policy the company agreed to pay to the beneficiary the sum of $10,000.00 upon receipt of due proof of the death of the insured or the sum of

$20,000.00 (double the face of the policy) if death resulted from accidental means as defined in and subject to the provisions set forth under "Double Indemnity". It was specifically provided, however, that the double indemnity provisions would be inapplicable if the insured's death resulted "directly or indirectly, from * * * war or any act incident thereto."

The annual premium paid by the insured for both the $10,000.00 face amount of the policy and the $10,000.00 double indemnity benefits totalled $351.70 which included an annual premium of $16.80 for the double indemnity coverage.

The application for the policy, dated May 24, 1938, shows that at the time of the issuance of the policy the insured was a student in his junior year at the University of Virginia, and at that time he was a Reservist in the Marine Corps subject to call to active duty in the event of war.

B. Death of the Insured.

The insured, a Captain in the United States Marines, died on May 19, 1943, from injuries sustained in an accidental fall over a cliff in an area in New Zealand which had been set aside for war maneuvers during the period that this country and the Dominion of New Zealand, together with our other allies, were actively at war with Japan and the Axis Powers.

At the time of the insured's death the 21st Regiment of the United States Marines was stationed in New Zealand and a specific maneuver area which comprised several square miles in a mountainous section of that country about one mile from the bivouac area had been set aside for its use (R. 67, 63). Captain Hooker was a member of the Third Tank Battalion of that regiment (R. 67). At the time of his death the entire regiment was engaged

in a progressive war training maneuver, projected for a period of five days, and Captain Hooker was acting in the capacity of a Japanese enemy scout in that maneuver (R. 62). The movement involved the whole maneuver area which had been set aside for that purpose (R. 60).

On the second or third day of the maneuver, Captain Hooker was captured by a combat patrol composed of about six men (R. 57, 56, 55, 53). The patrol started back to the command post with their prisoner (R. 62). After they had brought him about a thousand yards the patrol stopped for a rest (R. 69). Hooker pleaded with them to let him go (R. 63). They refused (R. 63). Then the insured took the guards by surprise and made a break to escape (R. 63, 69). One of the members of the patrol, in attempting to prevent the escape, threw his rifle at Hooker's legs, but this did not stop him (R. 60). Hooker continued running and all of the patrol went after him except a private who stayed to guard the rifles left behind in the chase (R. 55). Insured ran about one hundred yards and was about to be recaptured, when suddenly in the chase he leaped over a fence, breaking through bushes which were later found to cover the lip of a drop or cliff about 60 or 75 feet deep, and fell over the cliff (R. 53, 58).

A member of the patrol who was chasing the insured and directly behind him also jumped the fence during the chase and fell, but didn't go on over the cliff (R. 61, 62). The insured was found lying on his back at the bottom of the cliff about five feet from the edge (R. 62). When members of the patrol got to him he was semi-conscious and kept repeating such phrases as "Have to get away" and "Can't be captured." A few minutes later a corpsman arrived and administered morphine to relieve the pain. In about half an hour he was reached by a medical officer and was given first aid. The injury was received at 2:30

P. M. (1430 Navy time). Captain Hooker was removed from the chasm by stretcher and was taken by ambulance to the regimental field hospital of the United States Marines at Auckland, New Zealand, where he died a few hours later from the injuries incurred in the fall (R. 53-58, 60-67).

The insured was on official duty at the time the fatal accident occurred (R. 53).

C. Payment by the Company.

Respondent paid the face value of the policy in the amount of $10,000 and denied liability for any double indemnity payment on the ground that the death of the insured had resulted "directly or indirectly * * * from war or any act incident thereto."

Prior Proceedings.

Defendant's motion for summary judgment was denied by the District Court and final judgment was thereupon entered against the defendant in the amount of the double indemnity (66 F. Supp. 313). The judgment of the District Court was reversed and remanded by the Seventh Circuit Court of Appeals (161 F. (2d) 852). Thereafter, petitioner's application to the Circuit Court of Appeals for a rehearing was denied (R. 105).

Respondent's Points.

The petition for a writ of certiorari herein should be denied on the grounds:

I. None of the reasons set forth in Rule 38 (5) or any other matters which warrant the granting of a writ of certiorari are present in this case.

II. In any event the issues have been decided correctly by the Circuit Court of Appeals, Seventh Circuit.

Point I.

None of the Reasons Set Forth in Rule 38 (5) or Any Other Matters Are Present in This Case to Warrant the Granting of the Writ.

A. The Circuit Court of Appeals, Seventh Circuit, has not decided an important question of local law herein in any way in conflict with the local decisions.

1. The determinative rule of law upon which this case was decided, well-known to Illinois and Federal judges alike, is that in the absence of an ambiguity, the terms used in insurance contracts must be given their plain, ordinary, and popular sense.

In the majority opinion, the Circuit Court of Appeals said (R. 100):

> "The provisions of an insurance contract must be understood and accepted in their plain, ordinary and popular sense. * * * As we view the matter, his death was clearly an incident of war. The plain, unambiguous language of the exclusion clause as applied to the facts of this case requires a reversal of the judgment."

In the Supreme Court of Illinois case of (1944) *Moscov* v. *Mutual Life Ins. Co.*, 387 Ill. 378, the Court said (p. 383):

> "Again, contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense. (*United States Fidelity & Guaranty Co.* v. *Guenther*, 281 U. S. 34; *Chicago Nat. Life Ins. Co.* v. *Carbaugh*, 337 Ill. 483; *Kimbell Trust and Savings Bank* v. *Hartford Accident & Indemnity Co.*, 333 Ill. 318; *Crosse* v. *Knights of Honor*, 254 Ill. 80)."

The applicable substantive rule that the words, terms and provisions of insurance contracts must be given a practical, reasonable and fair interpretation and that such words must be given their plain or ordinary sense and common acceptation has been frequently applied and stated in Illinois and Federal cases. There is no conflict on that point.

(1946) *Zitnik* v. *Burik*, 395 Ill. 182, at p. 186.
(1944) *Moscov* v. *The Mutual Life Ins. Co.*, 387 Ill. 378, at p. 383.
(1929) *Kimbell Bank* v. *Hartford Acc. Co.*, 333 Ill. 318, 320.
(1933) *Williams* v. *Union Central Life Ins. Co.*, 291 U. S. 170 at p. 180.
(1932) *Bergholm* v. *Peoria Life, etc.*, 284 U. S. 489, 492.
(1945) *Maryland Casualty Co.* v. *Morrison*, 151 F. (2d) 772 at p. 775, 10th C. C. A.

2. It is equally well established law in both Illinois and Federal decisions that while ambiguous clauses should not be permitted to serve as traps for policyholders that this ancient rule of "strict" construction (Illinois cases

cited in petitioner's Brief, pp. 13, 14, 15 and 16) does not authorize the distortion of language or the creation of an ambiguity where none exists.

In the Supreme Court of Illinois case of (1938) *Coons* v. *Home Life Ins. Co.*, 368 Ill. 231 at p. 238 that court said:

> "While it is highly important that ambiguous clauses should not be permitted to serve as traps for policyholders, it is equally important to the policyholders, as well as to the insurer, that definite and clear provisions, upon which the calculations of the company are based, should be maintained unimpaired by loose or ill-considered interpretations. (*Williams* v. *Union Central Life Ins. Co.*, 291 U. S. 170 at p. 180)."

The above quotation from the Illinois Supreme Court (*Coons* v. *Home Life Ins. Co.*, 368 Ill. 231 at p. 238) adopts the identical words which were used by the Supreme Court of the United States in the case of (1933) *Williams* v. *Union Central Life Ins. Co.*, 291 U. S. 170 at p. 180.

In (1938) *Coons* v. *Home Life Ins. Co.*, 368 Ill. 231 at p. 238 the court said:

> "It is the duty of the courts to construe and enforce them as made, and not to make a new contract for the parties. *Blume* v. *Pittsburg Life & Trust Co.*, 263 Ill. 160; *Keller* v. *North American Life Ins. Co.*, 301 id. 198."

Again in (1914) *Blume* v. *Pittsburg Life & Trust Co.*, 263 Ill. 160, the Illinois Supreme Court said (p. 164):

> "* * * it is the duty of courts to construe and enforce agreements as made and not to make new contracts for parties."

And in (1903) *Norwaysz* v. *Thuringia Ins. Co.*, 204 Ill. 334 (p. 342):

> "Contracts of insurance are to be construed like other contracts * * * If the stipulation is one that the

> parties could lawfully make * * * it is the function of the court to enforce its observance as the parties made it, and not to make a new agreement * * *"

Likewise in the federal court in (1893) *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452 (p. 462):

> "The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

3. No Illinois case has been cited in the petition for certiorari and there is no Illinois case which holds that the relevant terms of the policy involved in *this* case are ambiguous or which refuses to apply the plain, ordinary sense of such terms to the specific facts of this case.

Rehash of cases in Illinois and elsewhere which have *different* words and terms in the policy and which have *different* facts does not establish a conflict with applicable local law.

Intelligent judicial cognizance was given in the majority opinion to Illinois and other cases, cited by the petitioner, which involved *different* words and terms in the policy and *different* facts. Thus the majority opinion devotes two or three pages to an individual review of the cases relied upon by the plaintiff in his petition for certiorari and concludes (R. 98, 99):

> "All these cases, so we think, are distinguishable from the instant case both upon the language of the exclusion clause and the facts responsible for death."

4. In the absence of an Illinois authority which was in point on the facts of this case applied to the particular terms of the policy involved it was entirely proper for the Seventh Circuit Court of Appeals to be aided by cases in other jurisdictions (R. 95, 96, 97). This is precisely what the Illinois Supreme Court would have done under the same circumstances.

In (1926) *Talty* v. *Schoenholz*, 323 Ill. 232, the court said (p. 241):

> "Where, however, a question is presented to this court the first time for decision and the same question has been determined by courts of final resort in other States, and especially where the decisions of the courts of other states upon the question are substantially unanimous, we would hesitate to give a contrary decision."

State law is to be applied in the federal court as well the state courts and it is the duty of the former in every case to find out from all of the *available data* what the state law is. (1940) *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 237).

The decision of the Circuit Court of Appeals shows that it did make its decision from such *available data.*

B. The Court of Appeals for the Seventh Circuit has not departed from the accepted course of judicial procedure.

In the petition for certiorari, the statement is made (p. 5):

> "• • • the majority judges of the Court decided the case in accordance with their own ideas of what the law ought to be and made no serious attempt to determine how the Illinois Court of last resort would decide the case."

On the contrary the majority opinion reviews and distinguishes on the facts the one Illinois case which plaintiff claims was "analagous" (*Mattes* v. *Merchants Reserve Life Ins. Co.*, 221 Ill. App. 648) and also reviews and distinguishes on the facts the cases of other jurisdictions cited therein (R. 98, 99). The majority opinion then states the rule that the provisions of an insurance contract must be understood and accepted in their plain, ordinary and

popular sense (R. 100) and applies that rule to the facts of this specific case to reach its decision. Such rule of plain, ordinary and popular sense or common acceptation is *stare decisis* in Illinois and elsewhere.

(1946) *Zitnik* v. *Burik*, 395 Ill. 182, at p. 186.

(1944) *Moscov* v. *The Mutual Life Ins. Co.*, 387 Ill. 378, at p. 383.

(1929) *Kimbell Bank* v. *Hartford Acc. Co.*, 333 Ill. 318, 320.

(1933) *Williams* v. *Union Central Life Ins. Co.*, 291 U. S. 170 at p. 180.

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(1945) *Maryland Casualty Co.* v. *Morrison*, 151 F. (2d) 772, at p. 775, 10th C. C. A.

The jurisdiction of the Federal Court in this case was invoked by the plaintiff on the diversity of citizenship ground. (R. 2.) No conflict of law issue was raised in the pleadings. (R. 2, 29.) The difficulty incident to the fact that there was no case strictly in point in Illinois was not a sufficient ground for the federal court to decline to exercise the jurisdiction to decide a case properly before it. (1943) *Meredith* v. *Winter Haven*, 320 U. S. 228, 237. It did decide the case and used the same rules of construction and judicial process to reach a decision which the Supreme Court of Illinois would have used under like circumstances.

Point II.

The Circuit Court of Appeals Correctly Decided the Issues in This Case in Favor of the Respondent.

From the undisputed facts in the record—the time, place, occupation, existence of war, and specific activity in which the insured and his companions were engaged which resulted in the fatal accident to the insured—the Circuit Court of Appeals decided that in common speech and common parlance such fatal accident did result directly or indirectly from an act incident to a specific war. This decision was correct.

A. The determinative and undisputed facts, taken in their entirety, upon which they based that decision were:

(1) The *time* was during the active phase of the war with Japan in the Pacific Area.

(2) The *place* was a specific area, which had been set aside by our ally, New Zealand, for use of our troops in the prosecution of that war.

(3) The *occupation* of the insured had become that of a captain in the United States Marines instead of a student in college.

(4) The dominant *purpose* of the American Marines was to prosecute the war to a successful conclusion.

(5) The specific war *activity* which resulted in the fatal accident was that of a five-day training maneuver of a rigorous character in which the insured took the part of a Japanese scout.

When all of these facts are taken together in this specific case, it must be recognized that the war training maneuver from which the fatal accident resulted, was a part of not merely the *state* of war but of the active *prosecution* of that war.

The Circuit Court of Appeals refused to hold that in the plain, ordinary and popular sense of the words used in the policy that the word "war" is limited to the actual combat phase of war and that an "act incident thereto must be confined to an "act" performed in connection with actual combat duty. In the majority opinion the court said (R. 100, 101):

> "To think, as plaintiff would have us do that war as used and intended by the parties was confined to combat service is to attribute to the word a meaning that is unnatural and unreal. Combat service is only the culmination of the myriad separate and independent acts all of which are an essential part of war * * * The thousands of men who failed to reach the combat zone but who sustained injuries and wounds during the course of their training would * * * be astounded and shocked if informed that they were not engaged in war and that their injuries were not sustained as a result thereof or an 'act incident thereto.'"

Thus the majority opinion of the Circuit Court of Appeals has merely applied the plain, ordinary and popular sense of the words and terms of this policy to the specific facts of this case.

B. The majority opinion of the Circuit Court of Appeals refuses to be led into the terms of some other policy or into the facts of some other fatal accident and adheres to the undisputed facts of this case. It summarizes these facts thus (R. 101):

> "The total objective of his military service was to prepare himself and those under his command to aid his country in winning the war. Solely for the accomplishment of this objective he and those under his command were stationed in New Zealand, a place designated for their training. They were engaged in an activity under military command as one of the nec-

essary steps in the conduct of the war. The insured was in New Zealand because of war and his activities were because of war."

Petitioner's Cases Distinguished.

Thus the Seventh Circuit Court of Appeals in its majority opinion distinguished on its facts the single indemnity case of (1919) *Mattes* v. *Merchants Reserve Life Ins. Co.*, abst. opinion, 221 Ill. App. 648 (printed in full in petitioner's brief p. 23).

That case had to do with a death which resulted from the quelling of a riot in Texas, which had nothing whatsoever to do with the prosecution of the war. It was not an activity which in any reasonable sense was a part of the prosecution of the war which existed between this country and the axis powers at that time. The riot was between colored troops and white civilians. The policy provisions were not the same but even if they were there is a very material difference between a fatal injury which resulted from the quelling of a race riot in Texas and a fatal accident which resulted from carrying on an activity which was a necessary part of the prosecution of a specific war.

With judicial thoroughness the Circuit Court of Appeals in its majority opinion distinguishes on its facts each of the cases of other jurisdictions upon which the petitioner relies in his petition for certiorari. (R. 98, 99.) Such cases are *Redd* v. *American Central Life Ins. Co.*, 200 Mo. App. 383, 207 S.W. 74; *Kelly* v. *Fidelity Mutual Life Ins. Co.*, 169 Wis. 274, 172 N.W. 152 and *Malone, et al.* v. *State Life Ins. Co.* 202 Mo. App. 499, 213 S.W. 877 (R. 98, 99).

By citation of the case of (1918) *Redd* v. *American Central Life Ins. Co.*, 200 Mo. App. 383, 207 S.W. 74 the petitioner brings into this case the type of adjudicated case

which stemmed from a "status" form of exclusion of liability clause under a single indemnity policy.

The *Redd* case turned on the construction of the term "active service in the army". The issue was whether the insured was in the "active" service at the time of his death. He was in a camp in this country and died from pneumonia. The terms of the policy were entirely different and there is a material difference between a fatal accident which results from a hazard incident to the prosecution of war such as a war training maneuver, and death from pneumonia, a disease which may strike civilian and soldier alike.

In the case of *Kelly* v. *Fidelity Mutual Life Insurance Co.*, 169 Wis. 274 (petitioner's Brief, p. 19), 172 N. W. 152, the facts showed that the insured under a single indemnity policy was riding on a motorcycle on a street in Paris in the same manner in which civilians at that time were using that street. How different is that situation from one in which it is undisputed that a reservation had been set aside by a foreign ally for the specific use of troops for training maneuvers. Under such circumstances civilians would not even be on the reservation or, if there, be permitted or have any reason to expose themselves to the hazards of such maneuvers in such territory. Even if they had been inclined to do so, they would have had no business to do so. The business of these Marines at the time and place involved which caused them to expose themselves to these hazards was the business of the proper conduct and prosecution of a specific war.

In (1919) *Malone, et al.* v. *State Life Insurance Co.*, 202 Mo. App. 499, 213 S. W. 877, an insured in a camp in Missouri was killed by an accidental gunshot from a fellow soldier. If an insured dies from the accidental discharge of a gun while indulging in a bit of horseplay or

tomfoolery, it would be difficult to say that such fatal accident directly or indirectly resulted from war or any act incident thereto.

Properly the Circuit Court of Appeals distinguished all of these cases from the case of a fatal accident due to the additional hazard of active participation in a war training maneuver which was a necessary part of the conduct of war. In such case it would be the active and serious participation of the insured and his comrades in this work which was a necessary part of the prosecution of the war which formed the substance of the additional hazard which resulted in such fatal accident.

C. With the same double indemnity clause before it the Supreme Court of Iowa in (1945) *Eggena* v. *New York Life Ins. Co.*, 326 Iowa 262, 18 N. W. (2d) 530 came to the same conclusion as was reached by the Seventh Circuit Court of Appeals in this case. The *Eggena* case is persuasive.

On April 27, 1943, a few days before Capt. Hooker's fatal accident in New Zealand, another insured, Charlie Lichtensinn, was killed at Camp Chaffee, Arkansas, in a war training accident in time of war. The Company, as here, paid the single indemnity. The identical war clause was involved in the claim for double indemnity. Insured, a private, was riding a government tank which was proceeding in a training convoy to a bivouac area. As the tank started across a bridge, the right track crashed through the bridge railing and fell to the stream bed below, causing the death of the insured from skull fracture.

The beneficiary sued to recover the double indemnity. The official report of death was before the trial court on stipulation. The trial court held that the accidental death resulted from an act incident to the prosecution of war. On appeal to the Iowa Supreme Court, this decision was

affirmed, all justices concurring. The court said (18 N. W. (2d) 530 at pp. 532, 534):

> "In the instant case the clause was, as stated: 'Provided, however, that such Double Indemnity Benefit shall not be payable if the Insured's death resulted, directly or indirectly, from * * * (d) war or any act incident thereto.' Insured's death * * * resulted directly from the carrying on of an act which was an essential part of the prosecution of war."
>
> "We can conceive of no part of a soldier's duties while an active member of a military force, except actual combat, which is more directly traceable to war than the performance of the duties in which the deceased was engaged at the time of the fatal accident. This would be the common understanding of an injury caused by war and it was so reported by insured's superior officer."

Equally persuasive is the reasoning of the court in the case of *Clarke* v. *New York Life Ins. Co.* in which the court of common pleas in and for the county of Sumter, South Carolina, decided that the death of an insured which occurred on February 15, 1944, from injuries sustained in an army aircraft accident while serving with the air corps in Florida resulted from war or an act incident thereto.

The court said:

> "In my opinion, his death did result from war or some act incident thereto. I don't think we should confine that to the battlefield or to actual combat. It is necessary in the prosecution of the war for troops in this country to carry on duties. We would not divide the line right at the battle front * * *. I think that a soldier who performs his war duties on the home front is participating in the war just as a soldier on the battlefield. I think that his death was not remotely the result of war, but was directly and proximately the result of war."

In the case of *Selenack, Adm.* v. *The Prudential Insurance Co., etc.,* 160 Pa. Super. 242, 50 A. (2d) 736, decided

January 17, 1947, by the Pennsylvania Superior Court, which affirms an appeal from the Municipal Court of Philadelphia County, the court reviewed the *Eggena* case and said of the decision in that case:

> "The court held, and properly so, that the death of the insured was a direct result of an act incident to war and recovery was denied on that ground."

Conclusion.

I.

In a case of first instance under Illinois law it was proper for the federal court to apply the well-known rule, common to Illinois and elsewhere that in the absence of an ambiguity the Court will apply the facts of a specific case to the terms of an insurance contract which will give the words used their plain, ordinary and popular sense. This is what the Seventh Circuit Court of Appeals did in this case and by that correct judicial procedure, reviewing all available data in the same manner that the Supreme Court of Illinois would have done, concluded, on the specific facts of this case, that the fatal accident to the insured did result directly or indirectly from war or an act incident thereto.

II.

Such decision was correct.

War training maneuvers at the time and place involved were activities of our troops incident to the prosecution of a specific war. They were commonly understood to be necessarily incident to the prosecution of that war.

> "* * * Words are to be construed according to their common understanding and common usage." (*Wolf* v. *Schwill,* 282 Ill. 189, 191.)

In common understanding and common usage the fatal accident to the insured "resulted, directly or indirectly, from war or an act incident thereto."

The petition for certiorari should be denied.

Respectfully submitted,

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